No. 606. 235.

Reply Brf. of Atty. Gen'l Conrad & Wh.
for Appellant (on Petition)

Filed Oct. 13, 1896.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
v.
GEORGE P. LIES & CO. } No. 606.

REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

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The learned counsel for the importers commence their brief with the very novel claim that the decisions which led the Board of General Appraisers to sustain the protest in this case were in nowise overruled by *Erhardt* v. *Schroeder*, 155 U. S., 124. If so, the argument of that case was conducted under a mistaken impression by counsel on both sides of it; and the undersigned, one of whom participated in that argument, are not sufficiently acute to discover the point of reconciliation. Nor are they able to appreciate the convincing character of an opinion which seems to them to have been written without careful examination either of the case which it cites or the statute upon which that case was decided; which statute, indeed, the learned counsel seem to have stopped reading just where the court did.

Two new arguments are made, however, which the undersigned feel able to cope with:

First, that if the Government contention is sustained, the importers will always be able, by filing "a perfunctory and colorless petition" (whose form "could easily be sold like law blanks by stationers"), to await "the benefit of anything in the way of a favorable decision that may turn up." Unfortunately, the importers are not entire strangers to such practices even now; but if their papers are too "perfunctory and colorless" their applications are subject to a motion to dismiss. If the Government files an application and asks, as the importers here did, "for a review of the questions of law and fact," it admits that all the questions of law and fact are before the court; but it is willing to take the risk of this, as it is not in the habit of filing the "perfunctory and colorless" applications toward which these importers so much fear that they will be tempted. In the thirty days to which the Government is restricted, on the other hand, it is always in danger, as here, of failing to be sufficiently advised of its rights, being not so well organized for rapid and effective customs litigation as are the able and erudite specialists who protect the interests of the merchants. It is not until a petition for review is actually filed that the Department of Justice has cognizance of the controversy. Consequently, if, as the undersigned believe, the filing of a "perfunctory and colorless" application by the importers operates to extend the Government's time for examining into the merits of a case, it is believed that the public interests will not so much suffer.

Second. Counsel argue that the action of the circuit court was equivalent to an order permitting them to withdraw their application for review. Were this so, it would have been equally appealable; for when, after an action has actually been put upon trial, plaintiff admits that he has no case, and defendant has a good counterclaim upon which no new action can be brought by him on account of the Statute of Limitations, it is error for the court to permit a nonsuit. (*Johnson* vs. *Bailey*, 59 Fed. Rep., 670, and cas. cit.; *Estell's Exrs.* vs. *Franklin*, 29 N. J. Law, 264.)

But this was no motion to withdraw. The circuit court granted no leave to withdraw. "The above cause coming on for hearing and determination before this court," and the evidence being submitted, and the applicant conceding that he had no case, and the Government pressing for a reversal, the court "ruled that the collector and Secretary of the Treasury or either of them [neither of them, by the way, being a party] could not be allowed to impeach or in any way object to the said decision," etc.; and therefore ordered, *adjudged, and decreed* "that the decision be in all things affirmed." This is clearly a decree upon final hearing, and has no analogy to such action as Mr. Justice Field suggested in Grisar's Case.

Respectfully submitted.

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